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NO. 82-1135

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CARL EDWIN WIGGINS,
Respondent

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF REPRESENTATION, DOES THE LIMITED PARTICIPATION OF STANDBY COUNSEL ABROGATE HIS EXERCISE OF THE RIGHT, ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF?

II. HAS THE FIFTH CIRCUIT EXTENDED *FARETTA V. CALIFORNIA* BY PRESUMING PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PROSE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORUNITY TO REPRESENT HIMSELF?

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BRIEF FOR PETITIONER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and submits this his brief.

OPINIONS BELOW

The unpublished opinion of the district court in *Wiggins v. Estelle*, No. SA-79-CA-123 (W.D.Tex. 1979) is reproduced at Appendix C in the petition for writ of certiorari, (hereinafter App. C). The opinions of the United

States Court of Appeals for the Fifth Circuit are published as *Wiggins v. Estelle*, 681 F.2d 266, *reh. denied*, 691 F.2d 213 (5th Cir. 1982), and appear as Appendices B and A in the petition for writ of certiorari. (hereinafter App. B, and App. A).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 1982. A timely filed petition for rehearing *en banc* was denied on November 8, 1982. The petition for writ of certiorari was filed within sixty days of final judgment in this case, S.Ct.R. 20.1, and was granted on February 22, 1983. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed... and to have to Assistance of Counsel for his defense.

United States Constitution, art. XIV, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner has custody of Respondent pursuant to a judgment and sentence of the 187th Judicial District Court of Bexar County, Texas. In January, 1973, Respondent originally was tried and found guilty of the offense of robbery, and his punishment was assessed at life imprisonment. On March 21, 1973, however, this conviction was set aside and a new trial was ordered due to a defective indictment. Respondent was reindicted for the robbery and trial in this cause began on June 4, 1973. At trial, Respondent asserted his desire to waive the assistance of counsel and to conduct his own defense. The trial court granted him the right to do so, but kept two appointed attorneys as standby counsel. On June 8, 1973, Respondent was found guilty of the offense. Punishment again was assessed at life imprisonment.

Respondent appealed to the Texas Court of Criminal Appeals and expressed his desire to waive appellate counsel and represent himself on appeal. Several months later, however, he requested the appointment of counsel. Although counsel was then appointed and timely filed an appellate brief, Respondent also filed a one hundred fifty (150) page appellate brief. The Texas Court of Criminal Appeals affirmed the conviction on March 26, 1975, in *Wiggins v. State*, 520 S.W.2d 780 (Tex.Crim.App. 1975).

Respondent then filed in the state courts five applications for habeas corpus relief and hundreds of pages of various pleadings. Respondent also has filed several prior applications for federal habeas corpus relief. A petition for writ of certiorari was denied by this Court on November 13, 1978.

In the instant cause Respondent applied to the United States district court again seeking federal habeas corpus relief in *Wiggins v. Estelle*, No. SA-79-CA-128. On August 25, 1980, the district court entered an order adopting the findings and recommendations of the Magistrate and denying habeas corpus relief. The opinion of a panel of the United States Court of appeals for the Fifth Circuit, reversing the decision of the district court and ordering that habeas relief be granted, was handed down on July 26, 1982; rehearing *en banc* was denied on November 8, 1982, with five judges dissenting. *Wiggins v. Estelle*, 581 F.2d 266 (5th Cir. 1982), *reh. denied* 591 F.2d 213 5th Cir. 1982). The petition for writ of certiorari was granted on February 22, 1983.

B. Statement of the Facts

On April 16, 1973, Respondent filed a request for appointed counsel prior to his second trial, specifically stating that he wished to rescind his earlier waiver of counsel (R. 584). On April 17, 1973, the trial court entered an order appointing attorney Benjamen Samples (R. 586). Thereafter Respondent continued to act in his own behalf. He filed a motion for a transcript of his prior trial, a motion to suppress the identification of the complaining witness, motions for witness fees and subpoenas, requests for a speedy trial and a change of venue, and a writ of habeas corpus (R. 590-613). On May 26, 1973, however, he filed an additional request for counsel (R. 623). On May 31, 1973, the trial court appointed additional counsel, R. Norvell Graham, to assist Respondent (R. 625). Nevertheless, Respondent continued to act in his own behalf, filing a motion for special relief, a motion in limine, a bill of exceptions and another special plea, and a motion for a jury shuffle (R. 628-649).

Pre-trial hearings began on June 4, 1973. Respondent, against the advice of one of the attorneys, announced ready for trial (R. 7-11). Conflict arose between Respon-

dent and the attorneys on this matter, and the trial court stated on the record that Respondent was exercising his right to represent himself and that the attorneys were appointed as standby counsel to consult with him when he so desired or when the trial court directed him to do so (R. 12-14). Thereafter, the court began consideration of Respondent's *pro se* motions (R. 14, 17, 21, 23, 31). During a lengthy discussion concerning discovery, counsel voiced a few requests for particular discovery, and argued in support of them, to which action Respondent made no objection (R. 32, 34, 35, 36, 37). At one point, Respondent halted the discussion and asserted his desire to proceed *pro se* (R. 39). Respondent was instructed that he might be required to consult with counsel on occasion (R. 40). Additional motions were then presented by Respondent (R. 42, 43, 44), and he personally conducted the examination of a witness concerning one of the motions (R. 47-55). Four times during the examination Graham assisted Respondent; no objection was made at any time to Graham's actions, and, at least once, Respondent specifically *approved* counsel's actions (R. 50, 51, 52, 54). Thereafter, Respondent alone argued additional motions (R. 57-63).

Pre-trial hearings continued on the morning of June 5, 1973. The trial court refused to dismiss the standby attorneys and refused to enter a specific order restraining the actions of counsel; rather, the court determined to take up individually any problems which arose between Respondent and counsel (R. 67). Additional *pro se* motions were then made and argued by Respondent R. 67-70).

The first jury panel was instructed that Respondent was exercising his right of self-representation, and that standby counsel was appointed to assist him (R. 71-72). At one point in the proceedings, the trial court erroneously informed the panel that Respondent was being tried as a repeat offender; counsel objected to this,

and moved for a mistrial, and Respondent specifically agreed (R. 81-82). The panel subsequently was quashed. The second panel was instructed as to Respondent's election to represent himself (R. 84), and Respondent made his opening statement to the panel (R. 101-104). Thereafter, Respondent conducted the *voir dire* examination for the defense *entirely* without assistance or interference from counsel (R. 106, 109, 112, 115, 118, 120, 122, 124, 127, 129, 133-6, 143, 147, 148, 151, 154, 156, 159, 161, 162, 167, 170, 172, 175, 177, 180, 182, 185). Thereafter, the jury was sworn and testimony began. Thus, the jury which tried Respondent was examined and selected by Respondent alone.

During all trial proceedings, Respondent examined and cross-examined witnesses, made objections to evidence and arguments, chose which defensive theories and witnesses he would present before the court, and argued his case to the jury at both stages of the bifurcated trial. During portions of the trial, Respondent *accepted* the assistance and aid of his standby counsel; during other portions he totally rejected any action taken on his behalf. While Respondent now complains of the actions of standby counsel, he more often than not approved of counsel's actions at trial. At various times during the trial, where counsel assisted in making objections or arguments, this action provoked no complaint or objection by Respondent (R. 196, 204, 235, 243, 261, 262, 287-9, 294, 301, 302, 339, 342, 373, 420, 421, 447, 524, 525, 526, 527, 529, 530, 539). Moreover, on various occasions, Respondent specifically *adopted* counsel's objections (R. 447-449, 342-344). During other portions of the trial, *both* Petitioner and counsel made objections and argued the same matters, cross-examined the witnesses, and argued to the jury.

Several times during the trial, a conflict arose between Respondent and standby counsel as to matters involving trial strategy. Each time, the trial court recognized

Respondent's right to make the necessary decisions as to the conduct of the trial, and *sustained Respondent's position* (R. 7-13, 253, 306-309, 341-346, 414, 415, 422, 427, 447, 449-450, 498-499, 544-545). At various other times, when counsel indicated that he wanted to interject matters into the proceedings, the trial court specifically inquired as to whether counsel had Respondent's permission to do so (R. 210, 306, 307, 341-342, 427).

SUMMARY OF THE ARGUMENT

The issue of first impression presented by this case concerns the question whether a criminal defendant's rights under *Faretta v. California*, 422 U.S. 806 (1975) are violated when standby counsel intermittently offers his assistance during the trial. The record reflects that Respondent, who asserted his right of self-representation in his 1973 aggravated robbery trial, actually managed, controlled and conducted his own defense. The court below, however, held that the limited assistance provided by standby counsel wholly abrogated the defendant's exercise of his right of self-representation and that federal habeas corpus relief was mandated by the Sixth Amendment. As was stated by the judges dissenting to the denial of rehearing *en banc*, the rule that standby counsel is "to be seen and not heard" and the presumption of prejudice established where standby counsel offers assistance, "defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in the impractical, inflexible strait-jacket." Additionally, the holding of the court below represents an unwarranted extension of *Faretta*. The essence of the right protected by *Faretta* is the genuine opportunity to participate in and manage the conduct of the defense. This, Respondent certainly had. The presumption of prejudice applied by the court below when standby counsel is "heard as well as seen" ignores

the fact that Respondent had a genuine opportunity to act in his own behalf in the criminal proceedings against him. This presumption establishes a rigid and unworkable rule, which could operate to the detriment of the criminal defendant, the state, and the entire criminal justice system. Because of the varying interests at stake, this Court should balance these considerations, and should adopt a rule which requires an inquiry into the defendant's genuine opportunity to conduct his own defense. Accordingly, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

REASONS FOR GRANTING RELIEF

I. WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF-REPRESENTATION, THE LIMITED PARTICIPATION OF STANDBY COUNSEL DOES NOT ABROGATE HIS EXERCISE OF THE RIGHT ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF.

In *Faretta v. California*, 422 U.S. 806, (1975), this Court recognized the constitutional right of an accused to dispense with the assistance of counsel and conduct his own defense, since the right to defend is personal and since the accused ultimately must bear the consequences of a conviction.

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . .The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the "assistance" of counsel,

> and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant. . . .To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists...
>
> Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Faretta v. California, 422 U.S. §20-21. Further, this Court held,

> Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

422 U.S. at 834.

Thus, unlike other constitutional rights, the right to proceed *pro se* does not concern a criminal defendant's right to a fair trial, as it is not "result-oriented; rather the right is based upon respect for personal autonomy

and "the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law." *Chapman v. United States*, 553 F.2d 886, 891 (5th Cir. 1977).

The Respondent in the instant case, tried in 1973,[1] requested and received his right of self-representation. Two standby attorneys, however, were retained by the trial court to assist and advise Respondent. The record reflects that one of these attorneys, Norvell Graham, participated to a limited extent, sometimes at Respondent's request, sometimes with his acquiescence and sometimes objectionably to him. The record as a whole, however, reflects that Respondent acted in the capacity of his own counsel, controlling, managing and presenting his defense before the jury. Most discussions as to strategy between Respondent and his standby counsel occurred out of the jury's presence. Each time there was any conflict between Respondent and standby counsel, the trial court recognized Respondent's right to make the necessary decisions as to the conduct of the trial, and sustained Respondent's position.

Thus, the record as a whole conclusively demonstrates that Respondent acted as his own counsel and actually controlled the conduct of the proceedings at trial. His personal decisions in proceeding to trial, examining and selecting the jury panel, making an opening statement, cross-examining the State's witnesses, selecting his defensive theory, deciding which witnesses to present, examining his own witnesses, making objections to evidence and arguing points of law to the court, and arguing his case to the jury, clearly show that he managed and controlled his own defense within the meaning of *Faretta*.

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1. Respondent was tried prior to this Court's decision in *Faretta*; the trial court, however, ruled that Respondent had the right to proceed *pro se*.

The essence of the right protected in *Faretta* is the control over tactical decisions and defensive strategy, and the opportunity personally to participate in the trial of the case before the finders of facts. This, Respondent clearly did. The record supports findings that Respondent, in exercising virtually exclusive management over the trial on the merits, clearly represented himself.

Nevertheless, the panel opinion held:

> . . .the rule that we establish today is that court-appointed standby counsel is "to be seen, but not heard"

681 F.2d at 273, and found that the limited participation of counsel completely abrogated Respondent's exercise of his right of self-representation.

As the opinion dissenting from rehearing *en banc* stated,

> The importance of this case arises from the fact that the rule enunciated therein that standby counsel is "to be seen and not heard" creates numerous difficulties for trial court judges in their conduct of criminal trials. This rule defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in an impractical, inflexible strait-jacket. I am concerned that it presents opportunities for ill-motivated defendants (or their attorneys for that matter) to set-up and sandbag the trial court into committing error. (footnote omitted).

691 F.2d 213, 215 (5th Cir. 1982).

Where a state criminal defendant, as here, is permitted to proceed *pro se*, the standard of review should be not whether standby counsel interjected himself into the trial proceedings in any way, but rather should focus on whether the *pro se* defendant was afforded a *genuine op-*

portunity to conduct his defense. In *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977), a lower court discussed an appropriate standard of review of abrogation of the right to proceed *pro se*, and iterated that because the right of self-representation is not "result oriented," the normal operation of the harmless error doctrine is inapplicable. Rather, that court suggested that the appropriate inquiry is whether a *pro se* defendant has been afforded a *genuine opportunity* to conduct his defense. 553 F.2d at 891 n. 9. The court below noted this language in *Chapman*, but nowhere did it discuss or consider whether Respondent had such a "genuine opportunity," or the applicability of this suggested standard of review. The test adopted by the lower court, that *any* interjection of standby counsel constituted federal constitutional error, should be rejected.[2]

In additional, the test adopted by the lower court establishes a rule which totally binds the hands of a trial judge confronted with a defendant exercising his *Faretta* right. Under this test, standby counsel would be absolutely prohibited from speaking up in the *pro se* defendant's behalf, no matter what the circumstances, unless the defendant, on the record, requested him to do so.[3]

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2. The opinion correctly pointed out that the application of this rigid test could result in defense counsel "sandbagging" the prosecution. 681 F.2d at 274.

3. The lower court made it clear that once a defendant invoked his Faretta right, "there will be no question of aquiescence [in counsel's participation] unless [it] has been overtly encouraged." Thus, it must appear *on the record* that the defendant is seeking counsel's assistance. Under these circumstances, the defendant must request assistance before the jury, or must request that the jury be removed so that he may make the request. In order to insure that the record affirmatively reflects that the defendant is overtly encouraging counsel's assistance, the trial court or prosecutor may deem it necessary to dictate into the record that counsel and the defendant

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This rigid and unbending rule would not serve the interests of justice. In *Cuyler v. Sullivan*, 446 U.S. 335, (1980), this Court stressed that:

> . . .a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment (citations omitted). . .

446 U.S. at 343. This Court continued, that when the state obtains a criminal conviction through a trial in which procedural and substantive safeguards are denied, it is the state that unconstitutionally deprives the defendant of his liberty, since the "[s]tate's conduct of a criminal trial itself implicates the state in the defendant's conviction." 446 U.S. at 344-45. Thus, the state, too, has a strong interest in obtaining lawful criminal convictions.

This interest was recognized in *Faretta*, wherein it was stated that it could not be suggested,

> that the quality of [a defendant's] representation at trial is a matter with which only the accused is legitimately concerned. . .Although we have adopted an adversarial system of criminal justice, see *Gideon v. Wainwright* [273 U.S. 335 (1963)], the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial."

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are conferring. Under the lower court's opinion, it would be insufficient for the record to merely reflect that the defendant conferred with standby counsel, and that counsel thereafter participated without protest by the defendant.

422 U.S. at 839 (Burger, C.J., dissenting).

Petitioner urges that the rigid holding of the court below ignores the basic principle that "the interest of the State in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" 422 U.S. at 849 (Blackmun, J., dissenting) *quoting*, *Berger v. United States*, 295 U.S. 78, 88 (1935).

To require the trial court and standby counsel to remain mute throughout the proceedings, no matter what transpires,[4] which is the ultimate result dictated by the lower court's opinion, may be detrimental to the interests of the defendant and also the state in ensuring fundamental fairness in criminal proceedings. [5] While the state's interest may not supersede a defendant's interest in exclusive management of his trial, that interest at least should be considered in determing whether a rigid test for constitutional error should be established, or whether the proceedings should be reviewed on a case

4. The lower court strongly implied that the trial court should have ordered standby counsel to remain mute, rather than determining to take up problems on an individual basis.

5. *E.g*: Under the test established by the panel opinion, if standby counsel heard evidence that the *pro se* defendant's confession might have been involuntary and brought that to the attention of the trial court, which then conducted a *Jackson v. Denno*, 378 U.S. 368 (1964) hearing and suppressed the confession, this action of counsel would constitute error of constitutional dimension. Further, pursuant to the standard adopted in the panel opinion, it would constitute *harmful* constitutional error, entitling the defendant to federal habeas corpus relief, since the request was at odds with the defendant's wishes and certainly contravened the interests of the defendant as set out in the lower court's opinion.

by case basis, to determine whether the *pro se* litigant was afforded a genuine opportunity to conduct his defense.[6]

Finally, although this Court in *Faretta*, held that a defendant who knowingly and intelligently elects to represent himself cannot thereafter complain that his defense was ineffective, it must be remembered that state and federal appellate courts retain the authority to set aside convictions based upon "plain error" or where it is "in the interest of justice." *See, United States v. Atkinson*, 397 U.S. 157 (1936); *Carter v. State*, 639 S.W.2d 13 (Tex.Ct.App. 1982); S.Ct.R. 34.1(a); Rule 103(d), F.R.E.; Rule 52(b), F.R.Crim.Proc. Recognition of this fact is particularly critical in light of the lower court's holding that any participation of standby counsel constitutes error, and the holding that counsel must be "seen and not heard." Thus, if error occurred at the trial which escaped objection by the *pro se* defendant, standby counsel would be prohibited from bringing it to the attention of the court in the presence of the jury, or at all if the *pro se* litigant protested.[7]

In this case, standby counsel's "interference" successfully prevented Respondent from being tried before a jury panel which was instructed prior to trial that he

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6 . Without the benefits of an adversarial system, the trial court and prosecutor must maintain vigilance to insure that the proceedings conducted are fair to the *pro se* defendant, and that he is not unduly prejudiced by this ignorance of the law or inability to protect his interests. Nevertheless, the perfect trial has yet to be conducted, and it may be that there will be instances where through inadvertence or inattention, the *pro se* litigant will stand alone, unprotected by the benevolence or accomodation of the trial court or prosecutor. It is this that standby counsel may seek to avoid, by interjecting himself into the proceedings if necessary.

7 . See note 5, *supra*.

was a repeat offender. The trial judge, who usually tried civil cases, mistakenly informed the panel of this fact; upon standby counsel's objections, the panel was quashed (R. 81-82). Had counsel not called the court's mistake to his attention, possibly it would have gone unnoticed until the appellate record was prepared. While the effect on appeal of such unobjected to error is unclear, it is clear that Respondent readily joined in the objection, accepted the benefit and likely obtained a fairer trial before a jury which was unaware of his prior criminal history.

In reviewing the rigid standard established by the lower court, Petitioner urges this Court to balance the interests of the defendant, the state and the criminal justice system in insuring fundamental fairness in state criminal proceedings. To adopt the inquiry whether a *pro se* litigant had a genuine opportunity to represent himself even if standby counsel volunteered assistance, would go far to protect the counterveiling interests involved, while protecting the litigant's established *Faretta* right.

Petitioner urges this Court to overrule this rigid test established by the court below for constitutional error, *i.e.*, whether standby counsel had been heard as well as seen, and to establish a standard of review which inquires into the *pro se* defendant's genuine opportunity to manage, control and conduct his defense at trial.

II. THE FIFTH CIRCUIT HAS EXTENDED *FARETTA V. CALIFORNIA* BY ESTABLISHING A PRESUMPTION OF PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PRO SE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORTUNITY TO REPRESENT HIMSELF.

The lower court's rigid review of standby counsel's conduct and the presumption of prejudice established are unwarranted. As noted by the opinion:

> [t]he *Chapman* decision did leave room, however, for a finding of harmless error if the defendant was "afforded a genuine opportunity to help conduct his defense." 533 F.2d at 891 n.9.

681 F.2d at 274, n.26. The court subsequently, however, found that speculation as to actual harm suffered by the Respondent through standby counsel's conduct was unnecessary, as it found that a presumption of prejudice would be applied wherever a standby attorneys is "heard as well as seen" A presumption of prejudice in these situations is unwarranted. *See e.g., United States v. Frady*, _____U.S. _____, 102 S.Ct. 1584 (1982).

In addition, the lower court noted that while:

> [i]nterjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their presence are not to be discounted. Conceivably, a defendant could become so frustrated or flustered by standby counsel's interference as to be unable to regain his composure by the time the jury returned.

691 F.2d at 274, n.27.

There is no basis for assuming that any comment made by standby counsel in the presence of the jury is inherently prejudicial to a defendant's exercise of his right of self-representation. Neither is this presumption mandated by *Faretta*; rather, it represents an unwarranted extension of *Faretta*, and grants to a *pro se* defendant the constitutional right to be free of any utterance

by his standby counsel, with a presumption of harm if he is not. Surely this broad construction of *Faretta* was not intended by this Court, since the essence of the right protected in *Faretta* is the opportunity to manage and participate in the conduct of the defense.

Further, the lower court's findings that discussions with or statements by standby counsel out of the presence of the jury "are not to be disregarded" because the defendant may become "frustrated or flustered," effectively tie the hands of both the trial court and counsel, for fear of later claims by a defendant that discussions of law or strategy "upset" him.

In addition, this language may well result in much confusion to bench and bar. The opinion noted:

> . . .in the interest of justice, the court or standby counsel may wish to draw the defendant's attention to some legal aspect of which he may be painfully unaware. In such instances the court, either on its own or after being asked by standby counsel, may *request* that the accused confer with counsel.

681 F.2d at 273, n.24. Yet in its discussion of the presumption of prejudice arising when standby counsel speaks, the lower court found that these discussions "are not to be discounted" in determining prejudice to the defendant. Thus, if standby counsel, perceiving some grave danger to the defendant's case, requests that the trial court retire the jury so that the matter can be explained to the defendant, standby counsel commits constitutional error. If the jury is removed and the legal matter is brought to the defendant's attention, it is quite conceivable that he later could claim that this diversion frustrated or flustered him, or that the mere act of counsel in requesting that the jury be removed

was sufficient to prejudice him before the jury or that it had a "negative impact" upon his self-representation. Thus, how the trial court and standby counsel are to walk this fine line is very unclear indeed, given the lower court's rigid test for constitutional error and its presumption of prejudice. Petitioner urges this Court, instead, to adopt the "genuine opportunity" inquiry as the standard of review and test for prejudice.

In *Brown v. Wainwright*, 655 F.2d 607 (5th Cir. 1982) (*en banc*), the defendant first invoked his *Faretta* right at the outset of his trial; however, during the course of trial proceedings, his subsequent conduct and behavior were found to constitute a waiver of his right. Petitioner urges that this represents the better approach. The lower court's treatment of Respondent's requests for standby counsel's assistance from time to time and his acquiescence in counsel's assistance on occasions is inconsistent with any notion to a *pro se* defendant may, by his conduct, waive self-representation. While clearly Respondent in the instant case never waived his *Faretta* right entirely, the record reflects that from time to time he sought out counsel's affirmative participation and then acquiesced in his services, which constituted a waiver during those moments of claims of "interference" by standby counsel.

The record reflects that Respondent more often than not approved of counsel's limited assistance at trial. On various occasions, Respondent adopted counsel's objections. Other times, Respondent acquiesced in counsel's assistance. During some portions of the trial both Respondent and counsel argued, at Respondent's request. If any conflict in trial strategy arose between the two, the trial court, after ascertaining Respondent's wishes, *always* sustained Respondent's position. Other times, when counsel indicated that he wished to make some point, the trial court specifically inquired whether counsel had Respondent's permission to do so. Finally,

most instances when Respondent and counsel disagreed as to strategy occurred entirely out of the presence of the jury. Each time Respondent's position was sustained by the trial court.

The lower court, however, wholly discounted Respondent's requests for counsel to assist him and his frequent acquiescence in and approval of counsel's participation, in finding that counsel's participation and assistance constituted harmful constitutional error. Further, the lower court failed to point out that Respondent's strategic decisions were always sustained, and the majority of the conflict between the two occurred out of the presence of the jury. Moreover, the panel admittedly engages in speculation regarding harm to Respondent. Finally, the panel states:

> Once the right of self-representation has been asserted there will be no question of acquiescence unless counsel's participation has been *overtly encouraged* by the defendant.

681 F.2d at 275 (emphasis added). The opinion, however, ignored the fact that portions of counsel's assistance *were* overtly encouraged by Respondent. Respondent's conduct in requesting counsel's assistance and adopting his legal theories constitutes a waiver of objection as to that extent of counsel's participation.

Because the record reflects Respondent alone made the decision to proceed to trial, conducted the jury *voir dire*, selected the jurors, examined and cross-examined witnesses, made tactical and strategic decisions, chose and presented his defensive theories, made objections to evidence and argued in support of his position, made objections to the court's charge and submitted requested charges, and argued his case to the jury at both phases of the trial, the lower court's holding that the limited assistance of standby counsel constituted harmful con-

stitutional error entitling Respondent to federal habeas relief, should not stand. This Court should reject the Fifth Circuit's adoption of a presumption of prejudice where standby counsel in any way assists a *pro se* defendant, who had a genuine opportunity to conduct his own defense within the meaning of *Faretta*.

CONCLUSION

For these reasons, Petitioner prays that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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